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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 462

BERRYMAN HENWOOD, Trustee of the St. Louis Southwestern Railway Company, a Corporation,
Petitioner,

vs.

O. R. CHANEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI.

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I.

PRELIMINARY STATEMENT.

(Figures in parentheses refer to pages of the printed record.)

This is a petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above case on July 12th, 1946.

The absence of any attempt in petitioner's brief to review the evidence fairly and impartially necessitates an additional statement, which, avoiding repetition, will be supplementary only. Petitioner's brief is characterized by an omission of vital and determinative facts; only the evidence favorable to the petitioner has been select-

ed for emphasis. Conflicting evidence has been ignored.

It seems that the defeated advocate is chronically unable to review the evidence in its aspects favorable to the successful adversary and petitioner's counsel is no exception. Construed favorably to respondent the evidence presents the following picture:

II.

STATEMENT OF FACTS.

This accident occurred in the railroad yard operated by the petitioner at Shreveport, Louisiana. One of the tracks in that yard is called the "lead track" which extends in a northerly and southerly direction. Most of the switching of cars in the yard is done on the lead track, and the switchman who acts as "pin-puller" performs practically all of his work north of the switch mentioned in the evidence as the T. & N. O. mainline switch.

Respondent had worked for petitioner as a switchman since 1937 (R. 225). He had just gone to work the morning of the accident at 8:00 a. m. (R. 226). He was the pin-puller on that job (R. 226). Respondent was working on what is known as an "inside lead" (R. 226). On an inside lead you have to continuously cross over tracks, rails and switch ties to pull the pins (R. 226). When a pin drops a pin-puller has to run along by the cars and try to pull it again (R. 37, 82). At the time of the accident the engine was headed north (R. 221). In cutting off cars they would kick them south (R. 227).

The movement upon which the accident occurred was pretty close to the first movement that morning (R. 237). It was a movement of 15 or 18 cars and he got a signal that there would be two cars to cut off and he

got on and rode (R. 237). He was then on the east side of the lead (R. 237). He rode the cut until it came to a stop (R. 238). He then got off on the ground (R. 238). Someone lined the switch while he waited (R. 238). The foreman gave a kick signal and he pulled the pin (R. 238). When he first pulled the pin he was on the east side of the lead just beyond the T. & N. O. mainline, thirty or forty feet (R. 238). That was a car length north of the frog (R. 238). He pulled the pin on the caboose (R. 239). He pulled the pin and stepped away from it and it went just a few feet and he heard the pin fall (R. 239). He took out after the cars and was going to pull the pin again (R. 239). He ran alongside the car and tried to get the pin to come up and stay up (R. 241). It worked pretty hard (R. 241). He was running along the side of the cars trying to pull up the pin when he slipped on the oil and slush and fell underneath the cars (R. 241). The oil and slush caused him to fall (R. 242). At the time he fell he was running and jerking and pushing at the pin lift lever trying to get the pin to come up (R. 242). At the time he slipped he was two and one-half cars north of the T. & N. O. mainline switch (R. 242). When he slipped he fell backwards and his right arm and right leg fell under the cut of cars (R. 243). He was shoved along down the rails (R. 244). He eventually cleared himself (R. 244).

From the time respondent first went to work until the date of the accident the condition of the lead had remained practically the same (R. 228). He noticed oil along the lead for the last couple of years from time to time (R. 228). Conditions kept getting worse all the time and more oil accumulated (R. 229). Most of the oil came from Cotton Belt engines (R. 229, 230). He

saw them leaking oil (R. 230). No walkway was ever built since he had been there (R. 231). He had dug little trenches himself to try to improve the footing (R. 234) on several occasions. It was usually a mixture of oil and water (R. 235). Just a few days before the accident he had burned some of the oil off (R. 235).

Respondent produced evidence that for years oil was present in such amounts all up and down the lead as a continuing condition that it created an unsafe place to work. Witnesses for both respondent and petitioner corroborated the testimony of respondent as to the condition existing along the lead.

R. A. Mayberry testified for respondent that he had been familiar with the locality since 1936 (R. 35). Footing was bad ever since he had been there (R. 38). The lead was in an unsafe and dangerous condition at the time of the accident (R. 40). He had complained of conditions to the general yardmaster, Mr. J. E. Irvine (R. 40). He noticed at the place where Chaney was injured that there was a pile of mud, dirt, oil and water mixed with bones and blood (R. 68). He noticed the footing there was slippery (R. 68).

W. T. Arnold, switchman for petitioner, testified there was oil all up and down the lead (R. 85, 101). That it was thicker in some places than in others (R. 85). This condition existed all through 1942, 1943 and 1944 and in 1944 there was more oil (R. 87). Much of the oil came from Cotton Belt engines (R. 87). At the time of the accident and immediately before footing was slippery (R. 91). He complained to Engine Foreman McAllister around in October (R. 92). He actually saw the engines leaking oil from time to time (R. 103).

J. C. Stout testified that all up and down the lead track the lead would be muddy and oily and slippery (R.

134). There was oil all up and down the lead (R. 134). Six weeks before the accident he took an engine into the roundhouse that was leaking oil (R. 134). Two or three weeks before Chaney's accident he slipped and fell on slick mud and oil (R. 139, 140). He complained of the slick and slippery lead to Mr. McAllister and Mr. King (R. 150).

C. T. Alexander was the foreman on Chaney's crew the morning of the accident (R. 183). He saw engines leaking oil for a period of two weeks to a month and a half before the accident (R. 186). He had seen oil on the lead (R. 187). He complained of one of the engines leaking oil to the roundhouse foreman (R. 189). The lead was slippery (R. 190).

W. J. Faircloth testified that the lead was wet and slick from oil and water (R. 195). That was true ever since he had worked there (R. 195). He had seen oil leak from other engines (R. 196). He complained to one of the yardmasters (R. 198). The morning after the accident he looked at the condition of the lead and it was wet and slippery (R. 195).

Troge T. Boothe testified that five or six weeks prior to this accident he slipped by reason of oil along the lead (R. 309). He made a written notation of this accident and it was November 23rd, 1944 (R. 309). The cause of his slipping was oil and water along the lead (R. 310).

A. H. Staffa testified the lead in 1944 was slippery from water, oil and muck (R. 312). In the spring of 1944 he slipped because of oil and muck and fell on the lead track (R. 312, 313).

W. M. Webb testified that he saw oil up against the rail all up and down the lead (R. 316, 317). He testified

that he reached Chaney right after the accident and Chaney said, "My foot slipped on the slick ground" (R. 316).

E. M. Robinson, engine foreman for the petitioner, had been eleven years in the Shreveport Yard (R. 364). He was out on the lead the morning the accident happened and saw oil there (R. 369, 370).

Tom Smith, petitioner's switchman, testified he saw oil on the lead (R. 426, 427).

R. E. Prudhomme, switchman for petitioner since 1918, testified that the ground was soft and muddy and there was oil on the lead (R. 439). He showed Mr. Pettigrew, the general superintendent, the condition of the lead out there several months before the accident (R. 440). He complained of slippery footing (R. 442).

J. J. Rains, another of petitioner's witnesses, testified the ground was muddy (R. 454). He saw oil right where Chaney got hurt mixed with mud and water (R. 454, 463).

W. E. Breuning, general foreman for petitioner, produced the locomotive inspection reports for the month of December, 1944 (R. 500). The reports showed complaints of oil dripping on December 12th (R. 505), December 17th (R. 505) on Engine 517. On Engine 518 there was oil leaking on December 12th (R. 506). Engine 520 was turned in December 12th with leaking oil (R. 506). The same engine was turned in on December 14th (R. 507). He brought only the reports for the month of December and could not say as to what the records might show for previous months (R. 515).

No witness testified that Chaney conducted himself in attempting to pull this pin in anything but the usual and customary manner.

POINTS AND AUTHORITIES.

A. The trial court committed no error in the admission of testimony and the evidence is sufficient to sustain the verdict.

Bailey v. Central Vermont Railway Co., 319 U. S. 350, 63 S. Ct. 1062.

Lowden v. Hanson, 134 F. (2d) 348.

1. Evidence as to prior injuries and falls at about the same place and under similar conditions was properly admitted.

20 *Am. Jur. on "Evidence,"* page 282, Sec. 304.

Evans v. Erie R. Co., 213 F. 129 (6 C. C. A.).

Benner v. T. R. R. A. of St. Louis, 348 Mo. 928, 156 S. W. (2d) 657, cert. den. 315 U. S. 813, 62 S. Ct. 798.

Charlton v. St. Louis & San Francisco R. Co., 200 Mo. 413, 98 S. W. 529.

T. & P. Ry. Co. v. Watson, 190 U. S. 287, 23 S. Ct. 681.

District of Columbia v. Armes, 107 U. S. 519, 2 S. Ct. 840.

Cropper v. Titanium Pigment Co., 47 F. (2d) 1038 (8 C. C. A.).

Illinois Central R. Co. v. Sigler, 122 F. (2d) 279 (6 C. C. A.).

128 *A. L. R.* 599.

45 *C. J.* 1246, Sec. 811.

1 *Greenl., Evidence,* Sec. 51A.

2 *Jones, Commentary on Evidence,* 2nd Ed., 1265.

Chicago Great Western Railway Co. v. Beecher, 150 F. (2d) 394.

Palmer, et al., v. Hoffman, 318 U. S. 109, 63 S. Ct. 477.

Vicksburg & Meridian R. R. Co. v. Putnam, 118 U. S. 545, 7 S. Ct. 1.

Texas & Pacific Ry. Co. v. Rosborough, etc., 235 U. S. 429, 35 S. Ct. 114.

Oklahoma Natural Gas Co. v. Ross, 131 F. (2d) 238.

George v. City of Los Angeles, 51 Cal. App. (2d) 311, 124 Pac. (2d) 872.

80 *A. L. R.* 446.

Wigmore on Evidence, 2nd Ed., Secs. 252, 458.

2. The admission of improper evidence is harmless error when the verdict or judgment is supported by sufficient and competent evidence.

Gillespie v. Collier, 224 F. 298.

M. K. T. Ry. Co. v. Elliott, 102 F. 96, aff'd 184 U. S. 695, 22 S. Ct. 937.

St. Louis & San Francisco R. Co. v. Duke, 192 F. 306.

Meeker v. Lehigh Valley R. Co., 236 U. S. 434, 35 S. Ct. 337.

Holmes v. Goldsmith, 147 U. S. 150, 13 S. Ct. 288.

Atlantic Coastline R. Co. v. Smith, 135 F. (2d) 40.

Southern Ry. Co. v. Wood, 116 F. (2d) 274.

Bristol Gas & Elec. Co. v. Boy, 261 F. 297.

L. & N. R. Co. v. Summers, 125 F. 719, cert. den. 192 U. S. 604.

New York, etc., R. Co. v. Winters, Admr., 143 U. S. 60, 12 S. Ct. 356.

Schwarz v. Fast, 103 F. (2d) 865.
Spotts v. Baltimore & Ohio R. Co., 102 F. (2d) 160, cert. den. *B. & O. R. Co. v. Spotts,* 307 U. S. 641, 59 S. Ct. 1039.
C., B. & Q. R. Co. v. Dawson, 245 F. 338.
U. S. v. Becktold Co., 129 F. (2d) 473.
Lavender v. Kurn, et al., ... U. S. ..., 66 S. Ct. 740, decided March 25th, 1946.

III.

ARGUMENT.

A. The trial court committed no error in the admission of testimony and the evidence is sufficient to sustain the verdict.

A discussion of authorities is unnecessary for the elementary proposition that it is the duty of a railroad company to furnish to its employees a reasonably safe place in which to do their work. This duty is a continuing one and is non-delegable and extends to all places where the employee may reasonably be expected to go in the course of his work. See *Bailey v. Central Vermont Railway Co.,* 319 U. S. 350, 63 S. Ct. 1062; *Lowden v. Hanson,* 134 F. (2d) 348.

1. Evidence as to prior injuries and falls at about the same place and under similar conditions was properly admitted.

Under the great weight of authority in this country evidence as to prior injuries at about the same place and under similar conditions is considered proper testimony. The applicable rule is well stated in 20 *Am. Jur. on "Evidence,"* page 282, Sec. 304, wherein it is stated:

"It is recognized in numerous cases that for certain purposes at least, evidence of other similar accidents or injuries at or near the same place or by the use of the same appliance suffered by persons other than the plaintiff and in other and different times, not too remote in point of time from the particular occurrence, is admissible."

In *Evans v. Erie R. Co.,* 213 F. 129 (6 Cir.), the court in discussing a crossing accident stated:

"* * * The rule is well settled in the Federal courts that testimony of other accidents in the same place is admissible not only to show the dangerous character of the place, but also that knowledge thereof was brought to the attention of those responsible therefor. The alleged dangerous character of the crossing would naturally affect the question whether a given speed was negligence or not, as well as whether gates or flagmen were reasonably necessary. In *District of Columbia v. Armes,* 107 U. S. 519, 525, 2 S. Ct. 840, 845 (27 L. Ed. 618), which was an action for injuries by reason of a defective sidewalk, Mr. Justice Field said, 'the frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least it is some evidence to that effect, * * * besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities.'

"In *Chicago and North Western Railway Company v. Netolicky* (C. C. A. 8 Cir.), 67 F. 665, 672, 14 C. C. A. 615, which was an action against a railway company for damages for an accident at a grade crossing, it was held proper to permit witnesses familiar with the locality to testify to narrow escapes they had had at the same crossing, in connection with the descriptions of the locality, for the purpose of showing the nature of the crossing and the difficulties of travelers in passing over it. In *Patton v. Southern Railway Co.* (C. C. A. 4 Cir.),

82 F. 979, 983, 27 C. C. A. 287, the rule of admissibility of proof of other accidents was applied in the case of the derailment of a train at a sharp curve at the foot of a steep grade. See also, *Smith v. Sherwood Township,* 62 Mich. 159, 165, 28 N. W. 806, where, in an action for negligently permitting a hole to remain in a bridge, at which a horse became frightened, evidence that other horses had shied at the same hole was held admissible.

"We think testimony of accidents at this crossing from Erie southbound passenger trains should have been received, as well as proof of alleged complaints by the public authorities to the defendant subsequent to such accidents relating to the claimed dangerous character of the crossing with the request that gates or watchmen be maintained thereat. We think, also, that testimony of narrow escapes therefrom should have been admitted, so far as testimony should be produced tending to show notice to defendant thereof either by express information or general public notoriety."

In the case of *Benner v. T. R. R. A. of St. Louis,* 348 Mo. 928, 156 S. W. (2d) 657, cert. den. 315 U. S. 813, 62 S. Ct. 798, there was an action brought under the Federal Employers' Liability Act. The deceased was killed as a result of a shock while using defendant's phone. Evidence that another employee had received a shock on the same phone both before and after the accident was admitted. On appeal the Missouri Supreme Court said:

"Defendant also complains of the admission of evidence that the witness Kroeck received a shock on this telephone on the same evening as the accident to decedent, *and again a few months later.* It is true that ordinarily such evidence of other accidents is not admissible because it tends to introduce issues confusing to the jury. But such evidence is admissible in the discretion of the trial judge where it shows or tends to show the condition of a

mechanism or instrumentality to be such that accidental injury could be caused by its use * * *. It is, of course, necessary to show that the condition of the instrument involved was the same at the time of the different occurrences proven, but such proof was here made. We think that the trial judge did not abuse his discretion in admitting this evidence." (Emphasis ours.)

In the case at bar it was shown that the accidents happened at or very near the same place and occurred because of similar conditions of oil and slippery footing (R. 136, 140, 152, 202, 203, 309, 310, 312, 313).

In *Charlton v. St. Louis & San Francisco R. Co.*, 200 Mo. 413, 98 S. W. 529, plaintiff was knocked from a box car by a water crane too near the track. Offered testimony of another witness that the same crane had hit his arm some time before the accident was excluded. In reversing the trial court, the Missouri Supreme Court said:

"Mr. Logue was a witness for plaintiffs. He had been a brakeman, working on defendant's road, and was familiar with the crane. He never measured its distance from the car, but knew that it brushed his arm once in passing. This evidence was excluded. We think it competent proof. It tended to show the nearness of the crane and its appendages, and hence the incident dangers. If the witness assumed an unnatural and unnecessary position when brushed by the crane, that was a matter to be developed by cross examination. The prima facie presumption was that he was exercising due care and was in a usual attitude, and it developed on defendant to overthrow this presumption. Furthermore, that accidents have theretofore happened under the same conditions at a given spot from the same cause seems competent proof. * * *"

Plaintiff showed that the prior accidents occurred under the same or similar circumstances and at or near the same place. Defendant now claims there were distinguishing circumstances. Such fact should properly have been brought out on cross examination. Further authorities to the effect that evidence of prior and similar accidents is admissible are *T. & P. Ry. Co. v. Watson,* 190 U. S. 287, 23 S. Ct. 681; *District of Columbia v. Armes,* 107 U. S. 519, 2 S. Ct. 840; *Cropper v. Titanium Pigment Co.,* 47 F. (2d) 1038 (8 C. C. A.); *Illinois Central R. Co. v. Sigler,* 122 F. (2d) 279 (6 C. C. A.); 128 *A. L. R.* 599; 45 *C. J.* 1246, Sec. 811; 1 *Greenl., Evidence,* Sec. 51A; 2 *Jones, Commentary on Evidence,* 2nd Ed., 1265.

Under Rule 43-a of the Rules of Civil Procedure, the admissibility of evidence is governed by the rule applied in federal courts or in the courts of the state in which the federal court sits, whichever favors its reception. Rule 43-a has been followed and applied in *Chicago Great Western Railway Co. v. Beecher,* 150 F. (2d) 394, and also by the Supreme Court of the United States in *Palmer, et al., v. Hoffman,* 318 U. S. 109, 63 S. Ct. 477.

Respondent might state in passing that it has been universally held that evidence of prior conditions and accidents is admissible where it relates directly to the instrument or place in question. See *Vicksburg & Meridian R. R. Co. v. Putnam,* 118 U. S. 545, 7 S. Ct. 1; *Texas & Pacific Ry. Co. v. Rosborough, etc.,* 235 U. S. 429, 35 S. Ct. 114; *Oklahoma Natural Gas Co. v. Ross,* 131 F. (2d) 238; *George v. City of Los Angeles,* 51 Cal. App. (2d) 311, 124 Pac. (2d) 872; 80 *A. L. R.* 446; *Wigmore on Evidence,* 2nd Ed., Secs. 252, 458.

However, the question of whether this evide ence was properly admitted or not is purely an academic one because there was more than sufficient evidence to sustain the verdict in this case, and under those circumstances this court will not review the evidence.

2. The admission of improper evidence is harmless error when the verdict or judgment is supported by sufficient and competent evidence.

Assuming solely for the purpose of argument that petitioner is correct in his contention that certain improper evidence was admitted, it appears conclusively that the admission of any such evidence was harmless and without prejudice to the petitioner and that there is more than sufficient competent evidence to sustain the verdict. It is universally held that where the party in whose favor judgment was rendered is entitled to recover, a judgment will not be reversed because of the admission of improper evidence.

In *Gillespie v. Collier,* 224 F. 298, the court stated as follows:

> "A witness for the plaintiff was allowed to testify, over objection, to the defective condition of the throttle, as disclosed by an examination about thirty-five days after the accident. Some time after the accident, but just how long does not appear, the engine was put out of use, and was not again employed before the witness took the throttle off and inspected it, and the rule is that, upon an issue as to the condition of machinery or appliances at the time of an injury, evidence of a defective condition at a later time is inadmissible, without proof from which a reasonable inference may be drawn that there has been no substantial change. *But the other evidence in the case showed so clearly the throttle was defective and leaked steam, and com-*

plaint of it had been made on that ground, that we think no prejudice resulted from the testimony of the witness. * * *." (Emphasis ours.)

Viewing the evidence in the light most favorable to respondent, it appears conclusively that there was substantial and overwhelming competent evidence to the effect that the so-called "inside lead" where the respondent was injured was slippery and unsafe from oil both at the time of the accident and for a long time prior. The unsafe and slippery footing was testified to by the witnesses R. A. Mayberry (R. 38, 39, 40, 41), W. T. Arnold (R. 85, 87), J. C. Stout (R. 134), W. J. Faircloth (R. 195, 197), C. T. Alexander (R. 184, 186, 190), E. M. Robinson (R. 369, 370), Tom Smith (R. 426, 427), R. E. Prudhomme (R. 439), J. J. Rains (R. 454, 461), J. J. Poe (R. 364), S. S. Barker (R. 436, 437), and the respondent.

The petitioner does not dispute the evidence of any of these witnesses that the footing was slick and slippery. He does not anywhere in his brief before this court or the lower court make any claim of impropriety as to the testimony of Alexander, Robinson, Tom Smith, Prudhomme, Rains or the respondent. The court should note particularly the testimony of E. M. Robinson, a witness produced by the petitioner. On pages 369 and 370 of the record, Robinson testified as follows:

"Q. (By Mr. DeParcq) As a matter of fact, Mr. Robinson, in working there that morning, right near where Chaney had been injured, you noticed oil, didn't you?

A. Yes, there was oil there.

Q. Then, as a matter of fact, along there where Chaney was hurt, that lead to the area where they walked, was in a slick and slippery condition?

A. Yes.

Q. Now, isn't it true, Mr. Robinson, that for some time previous to this accident there had been an engine up along there leaking oil?

A. I understand there had been.

Q. Well, when you say you understand, is that something you know from having worked there and having observed it?

A. Well, you could see along the lead, the middle of the track, where the oil had been leaked.

Q. Now, was that crude oil and very slippery?

A. Well, I have an idea it was various kinds of oil, because there were quite a number of cars moving through the yard daily.

Q. Now, isn't it a fact that at the time of this accident and before, in some places in the yard, there were large puddles of oil between the rails and outside the rails?

A. Well, yes, that was water and oil, where water had accumulated with the oil.

Q. And isn't it a fact that around where Chaney was injured and along the whole lead there was quite a bit of oil?

A. Yes, there was.

Q. And that made the ground slippery and hard to work on, especially after a rain, didn't it?

A. Yes, sir, it did.

Q. As a matter of fact, that condition could have been remedied by putting some gravel on those slippery places?

A. I think so, yes.

Q. Now, no gravel had been put on those places for quite some time before Chaney's accident?

A. Not a regular surface of gravel down, no, that I know anything about."

Robinson was petitioner's own witness as were Mr. Prudhomme and Mr. Rains who also testified to the same condition (R. 438, 439, 440, 454, 463). Many of the witnesses testified that the bad conditions had been brought to the attention of the managing officers of petitioner.

The fact was testified to by Mayberry (R. 40), Arnold (R. 92), Stout (R. 150), Boggs (R. 159, 160, 161), Alexander (R. 198) and Prudhomme (R. 440). Regardless of the fact that counsel contends that certain testimony was improperly admitted, there was more than sufficient substantial evidence to sustain the verdict. Petitioner does not at any time claim that the testimony as rendered by Alexander, Webb, Smith, Robinson, Rains or respondent was anything but proper. Yet all of these witnesses testified that the lead in question was soaked in oil and was very unsafe and dangerous. Robinson, Prudhomme, Smith and Rains were the petitioner's own witnesses. In *M. K. T. Ry. Co. v. Elliott,* 102 F. 96, aff'd 184 U. S. 695, 22 S. Ct. 937, it is stated:

> "The admission of incompetent evidence of a material fact is an error without prejudice, where the fact is proved by other competent evidence. * * *."

In *St. Louis & San Francisco R. Co. v. Duke,* 192 F. 306, it was said:

> "* * * The admission of improper evidence over objection to establish facts proved by other evidence introduced without objection is harmless error. * * *."

Other authorities to the effect that where there is substantial competent evidence to support a verdict, the admission of improper evidence is harmless are: *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 434, 35 S. Ct. 337; *Holmes v. Goldsmith,* 147 U. S. 150, 13 S. Ct. 288; *Atlantic Coastline R. Co. v. Smith,* 135 F. (2d) 40; *Southern Ry. Co. v. Wood,* 116 F. (2d) 274; *Bristol Gas & Elec. Co. v. Boy,* 261 F. 297; *L. & N. R. Co. v. Summers,* 125 F. 719, cert. den. 192 U. S. 604.

It is elementary and fundamental that a verdict rendered on conflicting evidence will not be disturbed. See

New York, etc., R. Co. v. Winters, Admr., 143 U. S. 60, 12 S. Ct. 356; *Schwarz v. Fast*, 103 F. (2d) 865; *Spotts v. Baltimore & Ohio R. Co.*, 102 F. (2d) 160, cert. den. *B. & O. R. Co. v. Spotts*, 307 U. S. 641, 59 S. Ct. 1039; *C., B. & Q. R. Co. v. Dawson*, 245 F. 338.

In *Spotts v. Baltimore & Ohio R. Co.*, cited *supra*, the court said:

> "* * * Nor can we say that, as a matter of law, the contradictory evidence offered by defendant showed that plaintiff's testimony cannot be true. A contention for such action is an appeal to us to weigh the conflicting evidence in the light of probabilities and thus to invade the exclusive province of the jury, and, on the application for a new trial, of the trial judge. This we may not do * * *."

In the case at bar there is an overwhelming mass of testimony to sustain the verdict regardless of whether the court should hold the testimony of certain witnesses incompetent. Any fair and impartial reading of this record will prove conclusively to this court that respondent here was forced to work along a lead track beside which the ground was saturated with oil, water, mud and slush in such manner that it was extremely unsafe and dangerous for the well-being of the employees. It cannot be said that any evidence adduced at said trial whether improper or not was prejudicial to the petitioner in the light of the overwhelming amount of undisputed evidence by innumerable witnesses as to such dangerous and unsafe conditions that were in existence not only at the time of the accident, but for a long time before.

Respondent in this case suffered the loss of an arm and a leg and the moderate verdict of $67,000.00 should more than convince this court that the jury could not have

been influenced by any sympathy or prejudice resulting from the admission of any so-called incompetent testimony.

Petitioner's theory that the accident was caused because Chaney wore too much clothing that morning was completely blasted. Their main witness on this point was Bill Cole. He saw the accident happen (R. 375). He say Chaney's coat fly (R. 375). However, he would not swear Chaney's coat caught on a car (R. 376). He could not say whether Chaney slipped, stumbled or fell (R. 376). He does not know if the wind blew Chaney's coat or if it caught (R. 376). He did not know the cause of the accident (R. 383). He would not say Chaney's coat got caught (R. 386). His testimony as to not seeing oil and as to good footing was impeached by his own statement (R. 386, 387, 388, 392 and 393). It must be remembered that the first statement from respondent was made right at the scene of the accident when he said to W. M. Webb (R. 316): "My foot slipped on the slick ground."

Whether prejudice results from erroneous admission of evidence is not to be determined abstractly, but depends upon the practical effect as viewed in the light of the trial as a whole. See *U. S. v. Becktold Co.,* 129 F. (2d) 473.

The request of petitioner for a writ of certiorari is beautifully answered in the recent decision of *Lavender v. Kurn, et al.,* . . . U. S. . . . , 66 S. Ct. 740, decided March 25th, 1946, wherein Justice Murphy, speaking for this court, said:

> "* * * *Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate sup-*

port in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance." (Emphasis ours.)

CONCLUSION.

The Supreme Court of the United States has emphatically stated that the court should not deprive an injured employee of a jury trial "in a close or doubtful case." The modern trend is well illustrated by the following decisions: *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 63 S. Ct. 444; *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062; *Owens v. Union Pacific R. Co.*, 317 U. S. 715, 63 S. Ct. 1271; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409.

A reversal of this case upon purely technical grounds would be a tragedy from the standpoint of respondent, whose injuries were so serious and permanent that they were not questioned at any stage of the proceedings. The evidence petitioner furnished an unsafe place to work is so overwhelming that this appeal appears wholly lacking in merit. We submit that in furtherance of justice, this court should deny the petition for writ of certiorari and uphold the judgment of the court below.

Respectfully submitted,

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